No. 75-418

In the Supreme Court of the United States

OCTOBER TERM, 1975

GILBERT FISHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of four counts of willful evasion of income tax for the years 1967 through 1970, in violation of 26 U.S.C. 7201. The court sentenced petitioner to concurrent 15 month terms of imprisonment on each count and a $10,000 fine. The court of appeals affirmed (Pet. App. A 1a-12a).

The judgment of the court of appeals was entered on June 30, 1975. However, the petition for a writ of certiorari was not filed until September 16, 1975. It is therefore out of time pursuant to Rule 22(2) of the Rules of this Court. Although petitioner apparently believes that the time for certiorari began to run on August 18, 1975, when the court of appeals issued a stay of its mandate (Pet. 2; Pet. App. B 13a), that date is of no significance for purposes of the time limits of Rule 22(2). At all events, the petition does not present any question warranting further review.

1. Petitioner's sole contention is that the trial court erred in permitting petitioner's ex-wife to testify against him. However, as the court of appeals correctly recognized, under the common law rule applied by federal courts (see Rule 26 of the Federal Rules of Criminal Procedure), the spousal privilege continues only for the duration of the marriage. Divorce removes the bar against testifying. *Pereira* v. *United States*, 347 U.S. 1, 6. Here, the marriage was dissolved by a final divorce decree more than two years before trial. Thus, *Hawkins* v. *United States*, 358 U.S. 74, which upheld the common law rule permitting one spouse to bar the testimony of the other on the ground that "[a]dverse testimony given in criminal proceedings would *** be likely to destroy any marriage" (*id.* at 78), is inapplicable, since petitioner's marriage had been terminated long before trial.[1]

2. The court of appeals also held that petitioner waived any objection to his ex-wife's testimony by failing to object at the first trial, which ended in a hung jury (Pet. App. A8a-9a). Petitioner argues (Pet. 13) that he did not waive the point because he had not learned that his ex-wife had appealed from the divorce decree until shortly before the second trial. But the court of appeals correctly observed, "the trial judge had every right to disbelieve Fisher since the notice of appeal in the Nevada [divorce] action was filed on May 28, 1974, and became a matter of public record three months before Fisher's first trial began.

[1] *United States* v. *Walker*, 176 F.2d 564 (C.A. 2), relied upon by petitioner (Pet. 11-12), is distinguishable. There, at the time of the trial, the marriage had not been terminated by divorce.

Morever, a copy of the appeal was served on Fisher's counsel in the divorce action on May 3, 1974"[2] (Pet. App. A 8a).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solictor General.

DECEMBER 1975.

[2] At the outset of the second trial, the court stated that if petitioner desired he could place in evidence the documents showing the appeal of his ex-wife (A. 540), but petitioner never did so. ("A." refers to the Appendix filed in the court of appeals.)

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